

This comment is submitted by the National Association of Retail Collection Attorneys (NARCA) in support of ACA International's request for clarification of the regulations on autodialers in favor of the debt collection industry.

NARCA is a trade association of 700 law firms that engage in the collection of consumer debt. Member law firms often handle debts from initial collection attempts through litigation and the enforcement of judgments. They provide legal representation for collection of delinquent accounts for all major creditors, including MBNA, Citigroup, Bank of America, Capital One, Discover, JP Morgan/Chase, and Target Financial Services; purchasers of charged-off debt, including Encore Capital Services and Asta Funding Corp.; vehicle purchase financing companies (Ford Motor Credit, DaimlerChrysler, etc.); and hospitals and healthcare companies.

The Telephone Consumer Protection Act, 47 U.S.C. 227(b)(2) provides in part, that:

"In implementing the requirements of this subsection, the Commission—

(B) may, by rule or order, exempt from the requirements of paragraph

(1)(B) of this subsection, subject to such conditions as the

Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

The history of the FCC's rulemaking is instructive. In the Notice of Proposed Rulemaking in the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 2736, para. 15 (rel. April 17 1992), automated calls by debt collectors were considered to be a "non-telemarketing use of auto dialers not intended to be prohibited by the TCPA." Upon receiving comments on its proposed Rules, the FCC concluded in its Final Order that "an express exemption from the TCPA's prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships." See Rules and Regulations Implementing the Telephone Consumer Protection Act

of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, para. 39 (footnotes omitted).

Whether telephone calls to debtors with delinquent accounts are generated by autodialers, by equipment that could be used as an autodialer, or by personally dialed calls, such calls have been and continue to be “non-telemarketing calls”. Debt collection calls are not transmitting unsolicited advertisements, and always result from a previous business relationship (even if not within the strict definition in the 47CFR64.1200(f)(3), which has a time limit on the “business relationship.”).

Confusion has arisen because of the use of language in the 1992 Final Order and in the 1995 Reconsideration Order that autodialed debt collection calls are exempt because the autodialer technology employed did not dial “random or sequential” numbers. Therefore, when in 2003 the FCC revisited the use of autodialers after technological innovation led to use of “predictive dialers”, there appeared to be an issue of whether the exemption of debt collection calls continued. Telemarketing calls were now prohibited to cell phones by automated dialers whether made “randomly or sequentially” or from a pre-programmed list of specific phone numbers. Since debt collectors use automated dialers that call the phone numbers of specific debtors, ACA International has requested clarification.

It is NARCA’s position that debt collection calls have been and should continue to be considered as outside the purview of the TCPA. The definition of telemarketing supplied by 47CFR64.1200(f)(7) is “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” Nothing about a debt collection call can be considered “telemarketing.” These calls are made to businesses’ existing or former customers who have not paid in full for the goods or services they have already received.

In its rulings from the passage of the TCPA until 2003, the FCC has made clear that autodialer-generated calls that were not sales calls did not fall under the TCPA restrictions. NARCA requests that the FCC once again clearly set forth the position that the TCPA does not apply to debt collection calls.

In the event that the FCC believes that debt collection calls fall

under the purview of the TCPA, NARCA joins ACA International in requesting that the exemption previously permitted for such calls be continued.

In the modern economy, debt collection is a volume business – hundreds of thousands of delinquent account files flow each month among corporations, collection agencies and law firms. Using the tools of a modern economy, such as automated dialers, makes resolution of claims faster, more accurate and more efficient.

Sales calls to cell phones were treated differently than calls to landlines in the TCPA because cell phone users incurred charges to accept incoming calls. However, since 1991, cell phone subscription plans have been evolving along with other technology, so that many consumers no longer incur a charge for incoming calls. Technology also permits the transfer of calls, at the user's discretion, between landlines and cell phones. Since more and more consumers are using cell phones in place of landlines, contacting debtors for collection purposes often involves calling a cell phone. In addition, some consumers, when applying for credit, supply only a cell phone number. These developments blur the distinction between cell phones and landlines that so concerned Congress and the FCC just a few short years ago.

From the beginning, the FCC has recognized specific exceptions for “commercial calls which do not transmit an unsolicited advertisement and an established business relationship.” The FCC found no conflict between the requirement for the identification of a caller in the TCPA, and the privacy provision of the Fair Debt Collection Practices Act (FDCPA) because debt collection calls were not considered to be “autodialer” calls. See Rules and Regulations Implementing the TCPA of 1991, CG Docket No. 02-278, Report and Order, 7 FCC Rcd 8752, para. 39.

NARCA agrees that a telemarketing call is a telemarketing call, whether made from an autodialer calling random or sequential numbers, or calling a list of pre-programmed phone numbers. The end result for the consumer is the same. At the same time, just because a specific technology can be used for inappropriate calls shouldn't make that technology off limits for all purposes. 47 U.S.C. 227(b)(2)(B)(ii) makes clear that the FCC may exempt commercial calls such as those made by debt collectors. The fact that technology has moved ahead and now both telemarketers and debt

collectors use predictive dialers does not change the basic fact that debt collectors are NOT making sales calls. Timely telephone communication with debtors is in everyone's best interest.

On this additional basis, NARCA requests that the FCC specifically state an exemption for automated debt collection calls made to cell phones regardless of the type of autodialer used.